Hovsepian v. Apple, Inc.
Doc. 139

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re ACACIA MEDIA TECHNOLOGIES CORPORATION	Case No. 05 CV 01114 JW MDL No. 1665 **JOINT FURTHER CASE MANAGEMENT STATEMENT PURSUANT TO COURT'S FEBRUARY 3, 2006 ORDER** **DATE:** February 24, 2006 **TIME:** 9:00 A.M. **CTRM:** Hon. James Ware

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Pursuant to the Court's February 3, 2006 Order Requiring Additional Briefing Before the February 24, 2006 Hearing Date, the parties, having conferred but being unable to reach agreement, hereby submit this Joint Further Case Management Statement which sets forth the parties' respective positions with respect to what claims must be construed and a schedule for claim construction proceedings.

I. ACACIA'S POSITION

There is a sharp distinction between Acacia's and defendants' case management proposals. Whereas Acacia sets forth a proposal that will allow for an early completion of all claim construction and pretrial proceedings, defendants only seek delay. Pursuant to Acacia's proposals, the Court could complete all claim construction for all four of the remaining patents-in-suit by as early as July, 2006 and thus complete all pre-trial proceedings in *all* of the MDL cases by as early as July, 2007. Pursuant to defendants' proposals, however, claim construction for *only* the '992 patent would not be completed until after July 14, 2006. No claim construction of any term in any of the other three patents-in-suit would even commence until some unspecified time thereafter, and no other pretrial or discovery proceedings would occur.

The Court should decline defendants' invitation to protract these proceedings. Some of these cases have been pending for more than three years. The Court has provided the cable and satellite defendants with a one-year opportunity to integrate themselves into this case and to put themselves on equal footing with adult entertainment defendants. Now that all of the parties are fully informed concerning these patents and now that the Court and Mr. Schulz are educated as to the technology and the teachings of the common specification, the Court can and should proceed as requested by Acacia, with a single claim construction proceeding on the terms of the four remaining patents-in-suit.

A. The Court Need Only Construe Eight Claim Phrases from the Four Remaining Patents-in-Suit to Place All of these MDL Cases Into Condition for Further Pre-Trial Proceedings

As a result of the Court's December 7, 2005 Order regarding the motions for reconsideration of the Court's July 12, 2004 Markman Order, there are four patents which remain at issue in these

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MDL proceedings – the '992 patent, the '275 patent, the '863 patent, and the '720 patent.[1]

The Court has already construed a number of claim terms and phrases from the '992 patent (claims 1 and 41) in its July 12, 2004 Markman Order. With the addition of the cable and satellite defendants into the MDL proceedings, the Court allowed all parties to seek reconsideration of any term that the Court construed in its July 12, 2004 Markman Order. In its December 7, 2005 Order, the Court confirmed all of its prior constructions for the terms which the parties sought reconsideration. Although the Court's construction of claim terms from the '992 and '702 patents has reduced the number of claims currently being asserted by Acacia, Acacia's infringement and validity case with respect to claims 41-46 of the '992 patent continues. Acacia does not believe that any of the unconstrued claim terms from the '992 patent, the '275 patent, the '863 patent, or the '720 patent present difficult claim construction issues or present the possibility of dispositive rulings with respect to any remaining patent claim in this case.[2]

There are only eight claim phrases from the four patents-in-suit which Acacia believes the Court must construe in order to complete claim construction for all of the patents-in-suit in this case.

These eight claim phrases are as follows:

'992 Patent:

1. "one of the receiving systems at one of the remote locations selected by the user" – '992 patent, claims 19 and 47.

2. "step of storing" – '992 patent, claims 23 and 24.

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[1] The fifth patent – the '702 patent – is no longer at issue, because the Court's December 7, 2005 Order held that the claims of the '702 patent are indefinite, and Acacia has filed a motion requesting that the Court enter judgment of invalidity and non-infringement of the '702 patent pursuant to Rule 54(b).

[2] At this time, Acacia has already served each defendant with a Disclosure of Asserted Claims and Preliminary Infringement Contentions pursuant to Patent Local Rule 3-1. Defendants, however, have not provided Acacia with *any* Patent Local Rule disclosures, including defendants' Preliminary Invalidity Contentions. Defendants have only provided Acacia with a list of seventeen terms and phrases from the remaining asserted '992 patent claims, but have not provided Acacia with a proposed construction for any of these terms. Defendants have not even provided Acacia with a list of the terms or phrases from the asserted claims of the '275, '863, or '720 patents. Without having any other disclosures from defendants, Acacia cannot know the significance which defendants place on the meaning of any of the claim terms listed by defendants and cannot know whether defendants believe that the construction of any of their terms would be dispositive of any claim or necessary to the resolution of any of these cases.

‘275 Patent:

3. “reception system associated with a receiving system at one of the remote locations selected by the user” – ‘275 patent, claims 2 and 5.

4. “playing back the stored copy of the information from the reception system to the receiving system at the selected remote location at a time requested by the user” – ‘275 patent, claim 2.

‘863 Patent:

5. “in response to the stored, compressed digitized data, transmitting a representation of the at least one item at a real-time rate” – ‘863 patent, claim 14; ‘720 patent, claim 8.

6. “using the stored compressed, digitized data to transmit a representation of the at least one item at a real-time rate to at a plurality of subscriber receiving stations” – ‘863 patent, claim 17.

‘720 Patent

7. “responsive to the stored compressed, digitized data” – ‘720 patent, claim 4.

8. “wherein the at least one of the plurality of subscriber selectable stations is located at a premises geographically separated from the location of the reception system” – ‘720 patent, claims 4, 8, and 11.

At the present time, Acacia does not believe that there are any other claim terms or phrases which would require construction by the Court.

B. Little if Any Further Claim Construction is Necessary With Respect to Seven of the Cable Defendants and Six of the Adult Entertainment Internet Defendants; the Court Should Set a Pre-Trial Schedule for these Defendants

For seven of the cable defendants and for six of the adult entertainment Internet defendants, the *only* claim terms currently being asserted by Acacia following the Court’s December 7 rulings regarding the ‘702 patent are claims 41-46 of the ‘992 patent:

Defendant	**‘992 Patent Claims**
Cable Defendants	
Arvig Communication Systems	41-45
Cable America Corporation	41-45
Cannon Valley	41-45

Defendant	'992 Patent Claims
Communications, Inc.	
East Cleveland Cable TV and Communications	41-45
Loretel Cablevision	41-45
Savage Communications, Inc.	41-45
Sjoberg's Cablevision, Inc.	41-45
Adult Entertainment Internet Defendants	
ACMP, LLC	41-46
Ademia Multimedia, LLC	41-46
Audio Communications	41-46
Cybertrend, Inc.	41-46
Lightspeed Media.	41-46
VS Media, Inc.	41-46

The Court has already construed many of the terms from independent claim 41 in its two Markman rulings and Acacia does not believe that there are any other terms from claims 41-46 of the '992 patent which must be construed by the Court.[3] If the parties are unable to agree to the meaning of these remaining terms and the Court's construction is required, those remaining terms can be added to the claim construction briefing and timetable proposed by Acacia. Therefore, for these cases only, the Court should immediately allow discovery to commence and should set dates for the discovery cut-off, etc.

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[3] Defendants contend that ten terms from claims 41-46 of the '992 patent require construction. Acacia objects to the Court construing two of the terms, because the Court has already construed them and defendants did not seek reconsideration. For one of the terms "the storing step," Acacia has already included the "step for storing" element in claims 23 and 24 to its list of terms to be construed. For the remaining seven terms, defendants seek construction of: "item;" "sending;" "storing;" "sending at least a portion of the file to one of the remote locations;" "the step of placing;" "predetermined voltage levels;" "the storing step;" and the preamble of claim 41 "a method of transmitting information to remote locations, the transmission method comprising the steps performed by the transmission system, of." Acacia believes that these terms are not controversial and that the parties should be able to reach agreement on their construction.

Defendants object to Acacia's proposal because it would place discovery in the MDL proceedings on separate tracks and cause separate trials in the transferor courts. This possibility was identified and endorsed by the MDL panel. The MDL Panel instructed the Court that it may permit discovery of "Round One" and "Round Two" cases to proceed concurrently, but on separate tracks, and that it would be proper for the Court to transfer some, but not all, of the actions for trial before other actions are ready for trial. *See, In re Acacia Media Techs. Corp. Patent Litig.*, 360 F. Supp. 2d 1377, 1379-1380 (J.P.M.L. 2005).

Acacia proposes the following pre-trial dates for these cases and these defendants only:

Date	**Event**
September 5, 2006	Deadline to complete all fact discovery.
October 2, 2006	Reports from retained experts under Rule 26(a)(2) due from plaintiff on issues which plaintiff bears the burden of proof.
October 30, 2006	Reports from retained experts under Rule 26(a)(2) due from defendants on issues which defendants bear the burden of proof.
November 27, 2006	Rebuttal reports due from plaintiff and defendants.
January 15, 2007	Expert discovery cut-off.
March 5, 2007	All dispositive motions to heard by this date.
April 9, 2007	Remand of these cases to their respective transferor courts.

C. Acacia's Proposed Schedule for the Claim Construction Proceedings

Acacia believes that the Court should construe in a single claim construction hearing the eight claim phrases listed above in Section A which appear in the four remaining patents-in-suit. If necessary, additional terms from claims 41-46 of the '992 patent can be added to the list of terms to be construed during that single hearing. Following the Court's ruling on those terms, the claim construction task will be completed for each infringement claim pursued by Acacia against each defendant:

Defendant	**'992 Patent Claims**	**'275 Patent Claims**	**'863 Patent Claims**	**'720 Patent Claims**
Cable Defendants				
Armstrong Group	41-45	None	14-19	None
Block Communications, Inc.	19-24, 41-49, and 51-53	2, 5	14-19	None
Cable One, Inc.	41-45	None	17-19	None
Cebridge Connections	41-45	None	14-19	None
Charter Communications, Inc.	19-24, 41-49, and 51-53	2, 5	14-19	None
Comcast Communications, LLC	19-24, 41-49, and 51-53	2, 5	14-19	None
Coxcom, Inc.	19-24, 41-49, and 51-53	2, 5	14-19	None
Massillon Cable TV, Inc.	19-24, 41-49, and 51-53	2, 5	14-19	None
Mediacom Communications Corporation	19-24, 41-49, and 51-53	2, 5	14-19	None
Mid-Continent Media, Inc.	41-45	None	14-19	None
NPG Cable, Inc.	19-24, 41-49, and 51-53	2, 5	17-19	None
US Cable Holdings, LP	41-45	None	14-19	None
Wide Open West LLC	41-45	None	14-19	None

Defendant	'992 Patent Claims	'275 Patent Claims	'863 Patent Claims	'720 Patent Claims
Satellite Defendants				
The DIRECTV Group, Inc.	41-45	None	17-19	4, 6-8, and 11
EchoStar Satellite LLC	41-45	None	17-19	4, 6-8, and 11
EchoStar Technologies Corp.	41-45	None	17-19	4, 6-8, and 11
In-Room Movie Defendant				
Hospitality Network	41-46	None	17-19	None
Adult Entertainment Internet Defendants				
Adult Entertainment Broadcast Network	19-22, 24, and 41-46	None	None	None
Adult Revenue Service	19-22, 24, and 41-46	None	None	None
AP Net Marketing, Inc.	19-22, 24, and 41-46	None	None	None
Askcs.com, Inc.	19-22, 24, and 41-46	None	None	None
Club Jenna, Inc.	19-22, 24, and 41-46	None	None	None
Cybernet Ventures, Inc.	19-22, 24, and 41-46	None	None	None
Game Link, Inc.	19-22, 24, and 41-46	None	None	None
Global AVS, Inc.	19-22, 24, and 41-46	None	None	None
Innovative Ideas International	19-22, 24, and 41-46	None	None	None
International Web	19-22, 24, and	None	None	None

Defendant	'992 Patent Claims	'275 Patent Claims	'863 Patent Claims	'720 Patent Claims
Innovations, Inc.	41-46			
National A-1 Advertising, Inc.	19-22, 24, and 41-46	None	None	None
New Destiny Internet Group	19-22, 24, and 41-46	None	None	None
Offendale Commercial Ltd. BV	19-22, 24, and 41-46	None	None	None

The claim construction hearing would not apply for any of the seven cable defendants or six adult entertainment defendants identified in Section B above, unless the proposed construction of the few additional terms from claims 41-46 of the '992 patent could not be agreed upon. The claim construction hearing would also not apply to the four cable defendants whom Acacia sued in New York – Time Warner Cable, Inc.; Insight Communications, Inc.; Bresnan Communications; and CSC Holdings. This is because Acacia has stipulated with these defendants, pending Court approval, to stay these cases until a final, non-appealable judgment has been obtained on any of the asserted patents. The MDL Panel has ordered these cases to be transferred from their New York Courts to this MDL proceeding, however, transfer has not yet occurred. The New York Defendants and Acacia have collectively filed a letter with the Court explaining the circumstances and requesting that the Court stay these cases.

Therefore, with respect to the defendants listed in the table above, Acacia proposes the following schedule, which follows the procedures set forth in N.D. Cal. Patent Local Rules 4-2 through 4-6, with some minor modifications regarding the claim construction discovery cut-off and the fact that the parties would not file a reply prior to the hearing, but instead would file a post-hearing brief three weeks after the hearing, similar to the procedures used for the motion for reconsideration:

Date	Event
By February 27, 2006	The parties shall exchange final lists of proposed terms and claim elements for construction for all four remaining patents – the '992 patent, the '275 patent, the '863 patent, and the '720 patent – pursuant to Patent Local Rule 4-1.
By March 16, 2006	The parties shall exchange Preliminary Claim Constructions and Extrinsic Evidence for the terms and phrases listed on both Acacia's and defendants' lists pursuant to Patent Local Rule 4-2.
By April 3, 2006	The parties shall complete and file a Joint Claim Construction and Prehearing Statement pursuant to Patent Local Rule 4-3.
By April 24, 2006	Acacia shall serve and file an opening brief and any evidence supporting its claim constructions pursuant to Patent Local Rule 4-5(a).
By May 8, 2006	Defendants shall serve and file their responsive brief and supporting evidence pursuant to Patent Local Rule 4-5(b).
By May 22, 2006	The parties shall complete any claim construction discovery, including expert depositions, if necessary.
To be set by the Court for a June hearing.	Claim construction hearing pursuant to Patent Local Rule 4-6.
Three weeks following the date of the claim construction hearing.	The parties shall serve and file post-hearing briefs.

D. Defendants' Proposal Seeks Delay

1. Defendants Greatly Exaggerate the Number of '992 Patent Terms Requiring Construction in Order to Require Unnecessary, Multiple Future Claim Construction Hearings

Defendants' proposed schedule, which asks the Court to conduct two claim construction hearings (one for the'992 patent claim terms to occur sometime after July 14, 2006 and a second for the'275, '863, and '720 patents to occur at some indeterminate time following the first hearing), will cause significant unnecessary delay. Defendants have greatly exaggerated the number of the '992 patent terms which defendants' believe require construction in an effort to convince the Court to order a separate hearing on the '992 patent terms and to delay that hearing until July. Defendants have identified to Acacia the following twenty-four terms from the '992 patent for which defendants shall seek construction from the Court:[4]

1. "receiving system";
2. "item";
3. "one of the remote locations selected by the user";
4. "sending";
5. "storing";
6. "storing a complete copy";
7. "time requested by the user";
8. "user";
9. "sequence of addressable data blocks";
10. "retrieving information in the items from the source material library";
11. "sending at least a portion of the file to one of the remote locations";
12. "the step of storing includes the step of storing the received information";
13. "the step of storing the received information in an intermediate storage device";
14. "step of placing";
15. "predetermined voltage levels";
16. "the storing step";
17. "A method of transmitting information to remote locations, the transmission method comprising the steps, performed by a transmission system, of";
18. "storage means in the transmission system for storing information from the items in a compressed data form, in which the information

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[4] In connection with the preparation of this Case Management Statement, defendants identified to Acacia the 24 terms listed below. However, on the morning of Friday, Februay 17, 2006, the day on which this statement was filed, defendants identified for the first time *nine* additional "means-plus-function" terms from claim 47 of the '992 patent for construction. Defendants have added these terms to further exaggerate the number of terms for construction. Indeed, defendants acknowledge that they expect that there will not be a dispute for many of these clauses.

includes an identification code and is placed into ordered data blocks";[5]

19. "requesting means in the transmission system, coupled to the storage means, for receiving requests from a user for at least a part of the stored information to be transmitted to the receiving system at one of the remote locations selected by the user";

20. "ordering means, coupled to the formatting means, for ordering the converted analog signals and the formatted digital signals into a sequence of addressable data blocks";

21. A distribution system as recited in claim 47, wherein the memory means includes a means for receiving information at the head end of a cable television reception system";

22. A distribution system as recited in claim 47, wherein the memory means is an intermediate storage device";

23. "storing, in the transmission system, information from items in a compressed data form, the information including an identification code and being placed into ordered data blocks"; and

24. "ordering the converted analog signals and the formatted digital signals into a sequence of addressable data blocks."

The majority of these '992 patent terms listed by defendants will not need construction. First, certain terms are clear and unambiguous requiring no further construction or definition beyond the claim language themselves. Words and phrase like "sending," "storing," "storing a complete copy," "receiving system," "item," "user," and "time requested by the user" hardly require briefing and claim construction rulings. Two of the phrases, "sequence of addressable data blocks" and "retrieving information in the items from the source material library" were already construed in the Court's July 12, 2004 Markman Order, and no party sought reconsideration. Finally, as the defendants themselves point out, the parties hope and expect to reduce this number through the meet and confer process after the parties exchange their proposed constructions of terms.

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[5] In their portion of this statement, defendants address the fact that Acacia contends that this term (and the "memory means" term) of claim 47 of the '992 patent are not governed by 35 U.S.C. § 112, ¶ 6, but Acacia has not included these terms in its list of proposed terms. Acacia has told defendants that it does not matter to Acacia whether these terms are construed pursuant to 35 U.S.C. § 112, ¶ 6 or not. Regardless, Acacia believes that parties should be able to reach agreement on the construction of these two terms.

For additional reasons, the '992 patent terms will *not* occupy a full round of briefing and hearing. Unlike the prior rounds of claim construction hearings, the parties will not have to include much technical or legal background in their briefs or at oral argument, because the parties already provided the Court with this information in the prior claim construction proceedings.

Defendants further contend that construction of the '992 patent terms will dispose of "many if not all of the asserted claims of the '992 patent," and therefore the Court should address the '992 patent claim terms in a single proceeding. Defendants do not contend that claim construction will dispose of claims 41-46 of the '992 patent, and therefore, following construction, these claims will remain in the case *and* the Court will still have to construe terms from the three remaining patents, a task which the Court could complete together with the terms of the '992 patent.

Defendants contend that the phrase "ordered data blocks" in independent claims 19 and 47 is indefinite, because "claim differentiation" requires that "ordered data blocks" be construed to mean something broader than "sequence of addressable data blocks." As Acacia will demonstrate, there is no claim differentiation issue between "ordered data blocks" of claims 19 and 47 and "sequence of addressable data blocks" in dependent claims 20 and 48, because both claims refer to "sequence of addressable data blocks" as "ordered information." The argument for indefiniteness regarding "ordered data blocks" is therefore not at all analogous to or even close to the argument that "sequence encoder" is indefinite, and this is no reason to deny Acacia's Rule 54(b) request, as defendants' also contend. Dependent claims 23 and 49 are also not indefinite, as defendants contend, and, whether these claims are infringed or not is not a matter for the Court at this time while it performs claim construction.

2. Defendants Have Proposed a Briefing Schedule to Unduly Protract and Delay Proceedings in this Case

Defendants' proposed briefing schedule is transparently delay-oriented. Defendants propose that the Court set aside a *fifteen week* period of time for the parties to exchange proposed constructions and fully brief the issues for the '992 patent terms. Contained within defendants' proposed fifteen-week schedule is a *six-week* time period to prepare opening briefs and an additional *six-week* time period to prepare responsive briefs. Such lengthy time periods for briefing these claim construction issues are unnecessary, even if the terms from the other patents are included. Acacia's proposed schedule is more realistic.

Further proof that defendants only seek delay is the fact that defendants' proposal does not even contemplate that the parties will discuss between themselves the construction of the claim terms of the '275, '863, and '720 patents until *after* the Court completes its construction of the '992 patent claim terms, i.e., sometime after July 14, 2006. Defendants do not even suggest that the parties should exchange proposed constructions for terms from the '275, '863, or '720 patents during the extended time period while the parties and the Court are addressing the terms of the '992 patent claims. Defendants have refused to provide Acacia with these terms, stating that the Court's June 27, 2005 Order held that the next claim construction hearing would only cover claims from the '992 patent. The June 27 Order did not hold that the next claim construction hearing would only cover claims from the '992 patent.[6]

Defendants' proposed schedule *ignores* the Patent Local Rules and therefore violates the June 27, 2005 Order. The June 27, 2005 Order requires the parties to meet and confer to create a schedule *which complies with the Patent Local Rules* for the construction of additional claim terms. Acacia's proposed schedule adopts Patent Local Rules 4-2 through 4-6, with some minor modifications to the schedules. This is a very important point because, pursuant to Patent Local Rule 4-2, the parties are required to not only exchange proposed claim constructions, they must also exchange any extrinsic evidence, including proposed expert testimony, on which the party intends to rely. Additionally, Patent Local Rule 4-3 requires that the parties include in the Joint Claim Construction and Prehearing Statement the identification of all intrinsic and extrinsic evidence which supports that party's construction. Pursuant to defendants' proposed schedule, however, the parties will not exchange this information and will not provide it to the Court.

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[6] In the June 27, 2005 Order, the Court only held that additional terms from the '992 and '702 patents would not be addressed at the September 8-9, 2005 hearings but instead would be addressed at a later date:

> On June 21, 2005, the Court issued an Order Following Case Management Conference detailing the status of pending motions and setting a two day hearing for reconsideration of its July 2004 Markman Order. On June 24, Defendants collectively file a Motion to Clarify June 21, 2005 Order. For clarification, the Court contemplated using the September 8 and 9 hearings to address any reconsideration motion and to consider additional terms of the '992 and '702 patents. The Court deems the Defendants' Motion to be a request to delay a hearing on any additional terms. The request is GRANTED.

(June 27, 2005 Order, at 1:18-25).

Defendants object to commencing pre-trial proceedings with respect to the Internet and cable defendants against whom only claims 41-46 of the '992 remain asserted, and instead propose that all defendants be treated the same. Under defendants' proposal, Acacia's cases against these Internet and cable defendants will effectively be *stayed* while these defendants wait for the Court to complete its construction of the claim terms from the '992, '275, '863, and '720 patents, none of which would apply to them. Under Acacia's proposal, however, none of these cases would be stayed, because pre-trial proceedings would immediately commence. If, however, claim construction disputes do exist with respect to these defendants, then these disputes can be resolved in a single claim construction proceeding involving all of the patents-at-issue, and, upon completion of this single claim construction proceeding, pretrial proceedings in *all* of the cases can proceed at the same time against *all* of the defendants.

Defendants' tactical decision to not provide Acacia or the Court with its proposed terms for construction from the '275, '863, and '720 patent was in furtherance of their intent to delay. By refusing to disclose, they impede the process from commencing. Defendants' counsel are fully capable of providing a list of terms from the '275, '863, and '720 patents by February 27, 2006 and are capable of providing their proposed construction for each listed term by March 16, 2006, as Acacia proposes in its schedule.

E. Acacia's Proposal is not Burdensome to the Defendants

Conducting a single claim construction hearing on all four patents-in-suit will not add any significant additional burden to any defendant. Acacia has identified only six claim phrases from the '275, '863, and '720 patents which require construction. No defendant will be required to address all of the claim terms identified by Acacia in all three of the '275, '863, and '720 patents, because Acacia has not asserted all three of these patents against any one defendant. Acacia has not asserted the '275, '863, and '720 patents against any of the adult entertainment defendants, and therefore a

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single claim construction hearing on the all four patents-in-suit will add *no* additional work for any of the adult entertainment defendants. Acacia has not asserted the '275 patent against any of the satellite defendants, and therefore the satellite defendants will only be required to address the terms in the '863 and '720 patents. Acacia has not asserted the '720 patent against any of the cable defendants, and therefore the cable defendants will only be required to address the terms in the '275 and '863 patents.

Acacia has asserted the '992 patent against all of the defendants and therefore conducting a single hearing on all four patents-in-suit will be more efficient than conducting two separate hearings. In a single hearing on all four patents, all of the parties will be represented at the hearing. Counsel for each party can address the claim terms which apply to their clients. The fact that some counsel will not address some of the claim terms is *not* inefficient. The Court could order that, at the hearing, the parties address the '992 patent claim terms first (all parties), the '863 patent terms second (cable and satellite), the '275 patent terms third (cable only), and the '720 patent terms last (satellite only). No counsel will be forced to "sit by" while others litigate issues that affect only them, as defendants contend, except that counsel for the satellite defendants will have to wait for the cable defendants to argue the '275 patent terms. Counsel for the adult entertainment defendants could leave, if they wish, following argument on the '992 patent claims. Counsel for the cable defendants could leave, if they wish, following argument on the '275 patent claims. The fact that counsel for the satellite defendants may have to wait for argument on the '275 patent is certainly no reason by itself to delay resolution of these cases, which have been pending for years, simply to conduct two separate claim construction hearings rather than a single hearing.

II. DEFENDANTS' POSITION

A. The Disputed Claim Terms of the '992 Patent Should Be Construed Before Other Issues Are Resolved.

Defendants submit that the degree of posturing found in Acacia's portion of this Joint Case Management Statement is inappropriate and not conducive to the spirit of cooperation with which the case management meet and confer process should be conducted. Nevertheless, Defendants feel

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compelled to respond briefly to Acacia's accusations that the defendants seek to unduly protract and delay these proceedings.

Contrary to the picture painted by Acacia, Defendants' case management proposal is not offered for the purpose of undue delay. Indeed, Defendants' proposal is entirely consistent with the approach that the Court has previously taken -- which has proven successful in greatly reducing the number of patent claims at issue. For example, the parties were given three months to prepare for the reconsideration of seven terms at the hearing on September 8, 2005. Here, Defendants propose to schedule five months to prepare for potentially 30 terms that the Court has not previously considered. This is hardly dilatory. Also, for Acacia to cry that the case now needs to be expedited, rings hollow; as it was Acacia that chose the manner in which so many defendants were added, and it was Acacia which sought multi-district litigation treatment of these proceedings, both of which have significantly impacted the ability of the Court and the parties to move this case forward. To date, Acacia has not undertaken any steps to reduce the number of claims at issue or the number of defendants. Accordingly, the phased approach previously adopted by this Court, which is carried-over in Defendants' present proposal, is a reasonable and orderly way to manage this case efficiently and cost effectively.

With respect to the meet and confer process concerning claim construction and scheduling, Defendants have participated fully and cooperatively -- although the same cannot be said of Acacia. For example, after the issuance of Judge Ware's Markman Order, Defendants worked jointly to provide Acacia with a preliminary list of claim terms from the '992 patent for Acacia's consideration. Defendants provided their list to Acacia even though Acacia had not provided Defendants with any such list of its terms. In response, Acacia stated only that it insisted all of the remaining patents should be construed in one proceeding, and still provided no list of claim terms for consideration by Defendants. Acacia then demanded that Defendants provide it with proposed claim constructions even though Acacia had not provided any of its own. Acacia's suggestion that Defendants could determine Acacia's proposed claim constructions from its "preliminary" infringement contentions -- those contentions merely recited the claim language without explanation -- was without merit. Acacia even refused to confer with Defendants in the preparation of a joint submission to the Court. It was only after the Court ordered the parties to submit a joint statement that Acacia agreed to discuss one.

Plaintiff also accuses Defendants of ignoring the local patent rules. Nothing could be farther from the truth. Defendants have no objection to following portions of the local patent rules with respect to claim construction, *e.g.*, disclosing intrinsic and extrinsic evidence and expert opinions (if any) for the terms to be construed. Defendants, however, believe it is potentially wasteful to proceed with additional contentions and discovery without further attempting to significantly limit the number of claims at issue. A tremendous amount of work will be saved if the number of claims can be reduced, as was the case with the '702 patent. For these reasons, and as more fully discussed below, the Court should adopt Defendants' proposed case management schedule for the next phase of this proceeding.

1. A Phased Approached Has Substantially Narrowed the Case.

Defendants propose that the Court continue to phase the proceedings in a manner that will permit the orderly management of the case. Construing the claims in phases has proven to be effective at simplifying the case and reducing the issues in dispute. As a result of the Court's claim-construction rulings to date, Acacia has decided to withdraw 22 claims that it previously asserted (claims 1-18 of the '992 patent and claims 10-13 of the '863 patent),[7] and has conceded, pending appeal, that all 42 claims of the '702 patent are both invalid and not infringed. Nevertheless, a large number of claims and claim terms remain at issue. Acacia is still asserting over 30 claims from four patents (the '992, '863, '275 and '720) against dozens of defendants.[8]

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[7] Acacia has not, however, provided any defendant with a covenant not to sue on these claims. Indeed, Acacia's refusal to provide such a covenant belies its emphatic assertion, in connection with its request for a Rule 54(b) certification that "the Federal Circuit will *never* be asked, in a subsequent appeal of another Yurt patent, to decide the purely legal question of the indefiniteness or the proper legal construction of the claim term[] . . . 'identification encoder.'" Acacia's Reply in Support of Rule 54(b) Request at 2:9-12 (emphasis in original). Acacia has already added claims it had previously indicated that it would not assert, and now wants to leave open the possibility of bringing suit again later based on the claims of the '992 and '863 patents that contain the term "identification encoding means," which Acacia has omitted from its current infringement contentions. If Acacia is allowed to add those claims later, or to assert them in a separate suit, the Federal Circuit might well be asked to reconsider essentially the same question.

[8] Defendants note that many of the 18 claims Acacia is now asserting from the '992 patent were

Because of the procedural posture of this case, Defendants do not believe the Patent Local Rules of this district should be applied in full at this time. *See* Patent L.R. 1-2 ("The Court may . . . eliminate or modify the obligations or deadlines set forth in these Patent Local Rules based on the circumstances of any particular case, including, without limitation, the number of patents, claims, products, or parties involved."). Instead, the logical and efficient way to proceed now is to complete the construction of the '992 patent, the first Yurt patent from which the other patents-in-suit descend, particularly given that the addition of the cable and satellite defendants to the case requires the construction of many additional claims.

2. A Large Number of Claim Terms Remain to Be Construed From The '992 Patent Alone.

Defendants believe that the Court will need to construe the following additional claim terms and phrases in the '992 patent:

1. "receiving system" (Claims 19, 47, and their dependents);
2. "storing, in the transmission system, information from items in a compressed data form, the information including an identification code and being placed into ordered data blocks" (Claim 19);
3. "to the one of the receiving systems at one of the remote locations selected by the user" and "the receiving system at the selected remote locations" (Claim 19);
4. "at a time requested by the user" (Claim 19);
5. "the step of storing includes the step of storing the received information at the head end of a cable television reception system" (Claim 23);
6. "the step of storing includes the step of storing the received information in an intermediate storage device" (Claim 24);
7. "a method of transmitting information to remote locations, the transmission method comprising the steps, performed by a transmission system, of" (Claim 41);
8. "sending at least a portion of the file to one of the remote locations" (Claim 41);
9. Defendants also plan to seek a ruling from this Court that the steps of all method claims must be performed in the order in which they are recited.

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not at issue against the Internet defendants during the prior *Markman* proceedings, including new claims against the Internet defendants themselves.

Moreover, there are several "means for" clauses in '992 claim 47 and its dependents, which the Court will need to construe:

1. storage means in the transmission system for storing information from the items in a compressed data form, in which the information includes an identification code and is placed into ordered data blocks;

2. requesting means in the transmission system, coupled to the storage means, for receiving requests from a user for at least a part of the stored information to be transmitted to the receiving system at one of the remote locations selected by the user;

3. transmission means in the transmission system, coupled to the requesting means, for sending at least a portion of the stored information to the receiving system at the selected remote location;

4. receiving means in the receiving system for receiving the transmitted information;

5. memory means in the receiving system, coupled to the receiving means, for storing a complete copy the received information; and

6. playback means in the receiving system, coupled to the memory means, for playing back the stored copy of the received information at a time requested by the user (Clauses 1-6 from Claim 47);

7. conversion means, for converting the analog signals of the information to digital components;

8. formatting means, coupled to the conversion means, for formatting the digital signals of the information;

9. ordering means, coupled to the formatting means, for ordering the converted analog signals and the formatted digital signals into a sequence of addressable data blocks and;

10. compression means, coupled to the ordering means, for compressing the ordered information (Clauses 7-10 from Claim 48);

11. A distribution system as recited in claim 47, wherein the memory means includes means for receiving information at the head end of a cable television reception system (Claim 49);

12. A distribution system as recited in claim 49, wherein the head end of the cable television reception system includes means for distributing compressed signals (Claim 51);

13. A distribution system as recited in claim 49, wherein the head end of the cable television reception system includes means for decompressing the received signals and for distributing the decompressed received signals and compressed received signals (Claim 52);

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14. A distribution system as recited in claim 47, wherein the memory means is an intermediate storage device (Claim 53).

Defendants expect that there will not be a dispute, for many of these clauses, about whether section 112, ¶ 6 applies, and what the corresponding structures are (if any). Defendants note, however, that based on Acacia's infringement contentions, it apparently plans to assert that at least two of these clauses—the first and fifth clauses in claim 47 ("storage means" and "memory means")—are *not* governed by section 112, ¶ 6. Since Acacia bears the burden of proof on that issue, its failure to include at least these clauses in its own list of terms that should be construed is puzzling.

Finally, there is a third class of terms that *may* need to be construed. Defendants hope, however, to reach an agreement with Acacia as to the meaning of many, if not all, of these terms through the meet-and-confer process after the parties exchange their proposed constructions. Such terms include, but are not limited to, the following:

15. "sequence of addressable data blocks";

16. "item";

17. "sending";

18. "storing";

19. "user"

Defendants expect that construction of the terms listed in the first group, above, in addition to any of the other terms about which the parties cannot reach a stipulation, will dispose of many if not all of the asserted claims of the '992 patent. For example, defendants believe that the term "ordered data blocks" in claims 19 and 47 is indefinite for the same reason that the Court held the term "sequence encoder" to be indefinite—claim differentiation requires that "ordered data blocks" be construed to mean something broader than a "sequence of addressable data blocks," but the specification provides no clue as to what such a broader construction should be.[9] Likewise, claims

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[9] This argument provides another reason for denying Acacia's Rule 54(b) request. Because the argument for indefiniteness of "ordered data blocks" is analogous to the argument that "sequence encoder" is indefinite, any review of those arguments in the Federal Circuit should occur

23 and 49 are either indefinite or simply not infringed, because, to the extent they can be understood at all, they require subscribers to maintain set top boxes at the cable head end.

Thus, Defendants believe that, once claim construction of the '992 patent is completed, Acacia may well concede that many of the claims that remain in the case are also invalid or not infringed, as it has done following the Court's prior claim-construction rulings. Failing such concessions, construction of these terms will very likely support removal of such claims by dispositive motion. At the very least, this Court's construction of the remaining terms of the '992 patent will simplify the procedure of construing the remaining patents, which descend from the '992 patent and share its specification.

3. Unlike the Other Patents, the '992 Patent Is Asserted Against All Defendants.

Dedicating the next phase to completing claim construction of the '992 patent is also appropriate because the '992 is the only remaining patent-in-suit that Acacia is asserting against all of the defendants. With the '702 patent out of the case, the '992 is the only patent asserted against the Internet defendants and several of the cable defendants. The '720 patent is not asserted against any Internet or cable defendants, and the '275 patent is not asserted against any Internet or satellite defendants. Construction of the terms in the '720, '275, and '863 patents will therefore not directly impact some Defendants. But the Court's construction of the remaining terms in the '992 will affect all parties, and there are ample remaining terms and other claim-construction issues in the '992 to occupy a full round of briefing and hearing. Defendants understand the Court's Order of June 27, 2005 to contemplate completing the construction of the '992 patent as the next phase in the case, and it remains the most efficient way to proceed. Thereafter, the disputed terms of the remaining patents can be addressed in an orderly progression and in parallel with any dispositive motions as to the claims of the '992 patent and subsequently construed patents.

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simultaneously, rather than in serial appeals.

4. The Unresolved Status of the New York Defendants Counsels For A Phased Approach.

Moreover, the status of the New York defendants remains unresolved. If those defendants will also be afforded an opportunity to move to reconsider this Court's constructions, it will be more efficient to finish construction of the '992 patent rather than attempting to construe the disputed terms in all of the asserted patents at this juncture.

B. Defendants' Proposed Schedule.

Accordingly, defendants propose the following schedule:

- The *Markman* hearing on the remaining '992 terms will be set for a date after July 14, 2006 that is convenient for the Court.
- Three weeks before the hearing date, Plaintiff and Defendants will file reply briefs on the disputed terms and other claim-construction issues raised by the '992 patent.
- Six weeks before the hearing date, Plaintiff and Defendants will file responsive briefs.
- Twelve weeks before the hearing date, Plaintiff and Defendants will file opening briefs on the '992 claim terms and other claim-construction issues.
- Eighteen weeks before the hearing date, the parties will exchange proposed constructions for the remaining '992 terms. The parties will thereafter continue to meet and confer for the purposes of narrowing the issues to be resolved by the Court.

C. Acacia's Multiple-Track Approach Should Be Rejected.

1. Discovery Under Acacia's Plan Will Be Inefficient, Illogical, and Unfair to Parties and Third Parties Alike.

Defendants vigorously oppose Acacia's request to place this case on multiple tracks. Acacia's proposal not only invites judicial inefficiency and confusion, but as with its past proposals, seeks to force the smallest entities to carry the water for all of the Defendants. Even before this Court is likely to complete the construction of the remaining limitations of the '992 patent, under Acacia's proposed schedule, fact discovery—including invalidity discovery—will be completed as to a substantial number of defendants. As has been demonstrated repeatedly, permitting discovery to begin before claim construction is finished is an invitation to inefficiency because the parties do not know which claims will ultimately be asserted, do not know the true scope of the claims, cannot intelligently determine the focus of any infringement inquiry, and certainly cannot identify which of the massive number of prior art references will ultimately be the most relevant. In addition, creating multiple discovery tracks will require multiple depositions of the inventors, redundant written discovery, and potentially multiple depositions of third parties. Such a process is unwarranted and unwise.

Acacia proposes a separate pre-trial schedule for the cable and Internet companies who are accused of infringing only claims 41-45 of the '992 patent. That proposal is illogical and should be rejected. The cable and Internet defendants accused of infringing only those claims should be treated exactly the same as the other defendants for at least three reasons.

First, Acacia's proposed pre-trial schedule would require the Court to order separate trials in the Ohio, Minnesota and Arizona[10] cases, but Acacia has not demonstrated that separate trials are proper under Federal Rule of Civil Procedure 42(b), which states that separate trials may be ordered "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Here, separate trials will be inconvenient, prejudicial, and inefficient—the opposite of the Rule 42(b) criteria. Nevertheless, Acacia proposes to proceed with discovery followed by remand to Judge Gaughan in Cleveland for trial against only one of the defendants in the Ohio case,[11] while the other Ohio defendants would continue to participate in the ongoing *Markman* process in this court. Similarly, Acacia proposes to proceed with discovery followed by remand to Judge Frank in Minneapolis for trial against only five of the seven defendants in the Minnesota case.[12] Finally, Acacia proposes to proceed with discovery followed by remand to Judge

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[10] The Ohio case is No. 1:04 CV 1847. The Minnesota case is No. 04-CV-04069. The Arizona case is No. CV 04 1891.

[11] The Ohio case is pending against: Armstrong Group, Block Communications, Wide Open West, LLC, East Cleveland Cable TV and Communications, LLC ("East Cleveland") and Massillon Cable TV, Inc. Only East Cleveland is accused of infringing just claims 41-45 of the '992 patent.

[12] The Minnesota case is pending against: Mid-Continent Media, Inc., US Cable Holdings LP, Sjoberg's Cablevision, Inc. ("Sjoberg"), Savage Communications, Inc. ("Savage"), Loretel Cablevision ("Loretel"), Arvig Communication Systems ("Arvig") and Cannon Valley Communications ("Cannon Valley"). Only Sjoberg, Savage, Loretel, Arvig and Cannon Valley are

Teilborg in Arizona for trial against only one of the three remaining defendants in the Arizona case.[13] This makes no sense. Acacia's proposal would create the potential for six trials in the place of the three trials that will result from the status quo—assuming the cases are not resolved on summary judgment. No wonder Acacia makes no attempt to articulate a rationale for its proposal under Rule 42(b) (or Rule 20(b), or any other rule of civil procedure).

Second, the discovery that the defendants accused of infringing only claims 41-45 of the '992 patent will take from Acacia will be entirely redundant with the discovery that the remaining defendants will want to take from Acacia. It is easy to foresee that the defendants accused under only '992 claims 41-45 will want discovery from Acacia on at least the following subjects:

- Ownership of the patent
- Inventors
- Inequitable conduct
- Validity
- Validity expert opinions
- Licensing Activities
- Reasonable Royalties
- Damages expert opinions

It is reasonable to expect that any discovery that the '992: 41-45 defendants will seek on these issues will overlap entirely with the discovery that the remaining defendants will seek on the same subjects. Acacia's proposal would require that this discovery be performed at least twice, whereas the status quo will allow it to happen only once, thus avoiding wasteful duplication. Likewise, assuming that Acacia will want to depose experts and/or third parties on validity issues, it makes no sense to do so in the context of only one patent. Even if Acacia were to argue that the

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accused of infringing just claims 41-45 of the '992 patent.

[13] The Arizona case is pending against: Cable America Corporation, Cable One, Inc. and NPG Cable, Inc. Only Cable America is accused of infringing just claims 41-45 of the '992 patent.

other defendants could participate in that discovery, it makes no sense to do *any* of this validity work before all of the claims of all of the patents are construed.

Third, the discovery that Acacia will seek concerning the alleged infringement of claims 41-45 of the '992 patent will involve all of the defendants, not just the defendants who are accused of infringing only those claims. This is true because all defendants are accused of infringing those claims, but most of the discovery relating to the alleged infringement will have to come from third parties. Claims 41-45 are method claims that call out no fewer than eight steps (in the case of claim 41, for example). But as Acacia itself has acknowledged in its infringement contentions, if the claimed methods are being performed (a matter that is disputed), then most of the steps of the claimed methods are performed by third parties and not by the defendants. Thus, Acacia will be required to seek discovery from these third parties to attempt to make out its case for infringement. What Acacia has not told the court is that the third parties who allegedly perform the steps of the claimed methods are generally the same for all of the defendants, not just those who are accused of infringing only claims 41-45. Therefore, Acacia's proposed schedule would require that significant third party discovery be conducted at least twice rather than just once as will be true if discovery relating to all defendants is conducted at the same time.

2. Fact Discovery Should Be Stayed Pending Claim Construction.

Accordingly, Defendants respectfully submit that discovery should only begin once the claim construction process as to all Defendants and all patents is complete. In this way, all defendants will be able to present this Court with unified motions for summary judgment as to the invalidity of any claims that may survive the upcoming rounds of claim construction. Should those motions be granted, there will be no need for individualized discovery and this case will come to a swift and efficient end. Even if the invalidity of any remaining asserted claims cannot be established by dispositive motion, staging discovery such that all defendants can participate remains the most reasonable and least burdensome approach—not only for the parties, but for third parties as well.

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